IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-988

BLUE SHIELD OF SOUTHERN WEST VIRGINIA, INC., ET AL., *Petitioners,*

v.

HERMAN L. BALLARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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The Respondents, Herman L. Ballard, *et al.,* submit that the petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit in this case should be denied. The Respondents concur in the Petitioners' discussion of the *Opinions Below, Jurisdiction, Questions Presented,* and *Statute Involved,* contained in the Petition for Certiorari which has been filed herein, and the Appendix to the Petition for Certiorari is incorporated herein by reference.

COUNTERSTATEMENT OF THE CASE

On January 7, 1975, six Huntington, West Virginia chiropractors commenced this civil antitrust suit on behalf of themselves and the other doctors of chiropractic who practice their profession in the State of West Virginia. Named as defendants are the five Blue Cross - Blue Shield companies authorized to do business in West Virginia, the individual medical doctors who have served as directors for those companies, and the West Virginia State Medical Association. The complaint charges that the defendants have combined and conspired in violation of the antitrust laws to monopolize the health care market in the State of West Virginia and to deprive the chiropractors of their right to practice their profession therein.

In essence, the chiropractors complain that by abusing its control over the local Blue Cross - Blue Shield companies, the medical profession is attempting to eliminate the chiropractic profession as a viable source of health care services. According to the chiropractors' theory of the case, two methods are being used to accomplish this unlawful scheme. First, the Blue Cross - Blue Shield companies are engaging in a primary group boycott of the chiropractic profession by refusing to pay for chiropractic treatment even though payment is made for similar treatment when provided by medical doctors and by refusing to provide benefits for chiropractic service which differ from those provided by the medical profession. Second, the Blue Cross - Blue Shield monopoly power in the West Virginia health insurance market is being used to discriminate against competing health insurance companies that are willing to provide benefits for chiropractic treatment. By these means, the co-conspirators have, in effect, engaged in a secondary boycott by economically persuading potential patients to refrain from seeking chiropractic care because of the personal cost to them, in favor of medical treatment where the expense is absorbed by the patient's insurance carrier.

In response to the complaint, the defendants moved to dismiss for failure to state a claim upon which relief could be granted. A hearing was held in the United States District Court for the Southern District of West Virginia, and after considering the arguments of counsel, that court ruled that

the case could not proceed as a class action, that the complaint failed to state a claim upon which relief could be granted, and that the Federal Courts did not have subject matter jurisdiction over the matters alleged. Later, the District Judge notified counsel that he was ruling that the McCarran-Ferguson Act exempted the Blue Cross - Blue Shield companies from the antitrust laws and that the medical doctors enjoyed immunity as members of a learned profession. On June 23, 1975, a final order was entered dismissing this case with prejudice (Pet. App. A) and the plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals reversed the District Court and remanded the case for further proceedings. Specifically, with respect to the Petitioners' contention that the McCarran-Ferguson Act exempts the Blue Cross - Blue Shield companies from the antitrust laws, the Court of Appeals stated (Pet. App. B at p. 12a):

> The complaint alleges that the defendants have combined and conspired to refuse insurance coverage for the services offered by chiropractors, to refuse payment of claims for services rendered by chiropractors even though claims for identical services rendered by physicians are honored, and to refuse permission for chiropractors to participate as officers in the companies offering Blue Shield Plans. Although the complaint did not employ the term "boycott," we believe these allegations sufficiently charge a group boycott in violation of the Sherman Act. * * * The complaint, therefore, alleges conduct that falls within § 1013 (b) of the McCarran-Ferguson Act subjecting the insurance companies, and those who have conspired with them, to the antitrust laws.

It is submitted that this decision is neither novel nor unique. It does no more than give effect to the unambiguous language of the McCarran-Ferguson Act by holding the plaintiffs' allegations of "boycott" state a claim upon which relief can

be granted. No ruling on the scope of the Act was made, nor did the Court of Appeals conclude that the insurance companies' conduct violated the antitrust laws. On the contrary, the Fourth Circuit's decision merely held that the chiropractors had alleged an insurance company boycott, which did not fall within the scope of the McCarran-Ferguson Act's antitrust exemption. Because of this, it is submitted that at this time review by the Supreme Court would be premature and that the Petition for Certiorari should be denied.

REASONS FOR REFUSING THE WRIT

The arguments presented in support of the petition for a writ of certiorari are twofold. First, the petitioners assert that the Fourth Circuit's decision is inconsistent with a well-established line of McCarran-Ferguson Act cases in other circuits; and second, that this decision will open the floodgates of litigation to private plaintiffs who feel aggrieved by a violation of the antitrust laws. Neither of these arguments is well taken. The consistent line of appellate decisions to which the petitioners refer are most unpersuasive, not only because they are totally devoid of any reasoning to support the holding enunciated, but also because they completely eschew the unambiguous language of the McCarran-Ferguson "boycott" exception. The petitioners' contention that the Fourth Circuit's decision is subversive because it will permit parties who have been injured by anticompetitive conduct to seek relief in the federal courts is similarly unpersuasive, being a conclusion which runs contrary to our national policy of encouraging private enforcement of the antitrust laws.

By enacting the McCarran-Ferguson Act, Congress did not intend to bestow an absolute privilege to violate the antitrust laws upon insurance companies. Rather, that law was enacted solely to permit the States to regulate the relationship between an insurance company and its policy holders. *S. E. C.* v. *National Securities, Inc.*, 393 U. S. 453 (1969). It was never the intention of Congress to allow the states to immunize those types of pernicious, anticompetitive conduct which have

absolutely no economic value. *Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F.2d 841 (2nd Cir. 1963), *cert. denied*, 376 U. S. 952 (1964). Accordingly, the Act simply declared that "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott coerce or intimidate, or act of boycott, coercion or intimidation." 15 U. S. C. §1013(b). A less ambiguous statement could not have been drafted, and there is nothing in that language which would limit the application of the law in the manner argued by the petitioners. Instead, the terms of the Act are plenary with respect to the excepted activity; its effect does not vary with the identity of the target against whom the anticompetitive conduct of an insurance company is aimed.

Certainly, the Respondents recognize that two Courts of Appeals have apparently limited the application of McCarran-Ferguson Act to situations in which one insurance company has directed its anticompetitive activity against another insurance company or agent. *Meicler* v. *Aetna Casualty & Surety Company*, 506 F.2d 732 (5th Cir. 1975); *Addrissi* v. *Equitable Life Insurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied* 420 U. S. 929 (1975). However, the mere fact that there is an inconsistency among several Courts of Appeals does not render the Fourth Circuit's decision appropriate for review by this Court at this time. Neither *Meicler* nor *Addrissi* discussed the legislative history which purportedly limits the application of the McCarran-Ferguson Act; nor did they attempt to reconcile their interpretations with the contrary language of the provision in question. Rather, each of those decisions simply stated, without any reasoning, that the legislative history of the Act demonstrated a Congressional intent to limit the exception to a narrow class of cases.[1] This historical conclusion is clearly inconsistent with this Court's discussion of the legislative background surrounding the passage of the McCarran-Ferguson Act contained in *S. E. C.* v. *National Securities*, 393 U. S. 453, 459 (1969):

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[1]Each of these decisions relied upon the holding in *Transnational Insurance Company* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966), which did not discuss the legislative history upon which it was relying.

Under the regime of Paul v. Virginia, supra, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The South-Eastern Underwriters decisions threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Association Case." HR Rep. No. 143, 79th Cong, 1st Sess, 3 (1945).

Furthermore, since both *Meicler* and *Addrissi* ruled on issues that are quite dissimilar from those raised in this matter, the Petitioners' reliance on those authorities is misplaced. In *Meicler,* a dissatisfied policyholder attempted to circumvent the McCarran-Ferguson exception applicable to uniform risk classification among regulated insurance companies by contending that the refusal to sell a policy at other than the established rate constituted a group boycott which violated the antitrust laws. Similarly, in *Addrissi* a policyholder alleged that the practice of a regulated insurer which required the purchase of a life insurance policy as a prerequisite to obtaining a real estate loan constituted an illegal tying arrangement which fell within the "boycott exception" to the McCarran-Ferguson Act. Neither of these cases presented factual circumstances which resemble the fact allegations in this matter. Here the chiropractors' complaint charges that insurance companies have conspired with non-insurance companies to boycott competitors

of those non-insurance companies for the purpose of enabling those non-insurance companies to monopolize a non-insurance market. This is certainly a different situation from those of *Meicler* and *Addrissi.* Because of this, it is submitted that the Fourth Circuit's decision is not as significant as the Petitioners contend and that the apparent conflict among the circuits is more illusory than real.

Moreover, the Fourth Circuit's decision cannot possibly "wreak havoc with the Congressionally mandated scheme of State regulation," nor will it open the floodgates of litigation, as argued by the petitioners. All that court did was hold that the chiropractors' claim of insurance company boycott raised a litigable issue which warranted further factual development. It is anticipated that there will be much dispute over these factual matters. It is submitted that before this Court should consider the scope of the McCarran-Ferguson Act, it should have the benefit of that full and complete factual record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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